Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

PARKSON CORPORATION,

Petitioner,

vs.

ACS CONSTRUCTION COMPANY, INC. OF MISSISSIPPI,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Will this Court uphold the Federal Regulations and public policy requiring free and open competition in federal procurement bidding, as did the Seventh Circuit in *Waldinger Corporation v. CRS Group Engineers, Inc., et al.*, 775 F.2d 781 (7th Cir. 1985)? *Waldinger* held that an equipment vendor had a right to rely upon Federal Regulations prohibiting exclusionary specifications which limit bidding to only one brand of equipment on federal projects. The trial court expressly refused to follow *Waldinger* or to apply it to essentially indistinguishable facts in this case. The Eleventh Circuit affirmed this decision thus creating a conflict between the Seventh and Eleventh Circuits on this important issue.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Axel Johnson, Inc., is the parent company of Parkson Corporation.

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Petitioner, Parkson Corporation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at 3a. The unreported opinion of the District Court in this case is reproduced at 7a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 5, 1996, and denied Petitioner's Petition for Rehearing on June 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL REGULATION INVOLVED

The pertinent provisions of the EPA regulations at issue herein are quoted as follows. The entire text of the regulations are reproduced in the Appendix at 17a-20a.

1. Under the heading "Non-Restrictive Specifications", the regulations set forth that, subject to several exceptions not applicable here, "no specification for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance . . ."

2. Under the heading "Sole Source Restriction", it provides that, subject to several exceptions not here applicable, "a specification shall not require the use of structures, materials, equipment, or processes which are known to be available only

from a sole source . . ." (emphasis added). 40 C.F.R. § 35.936-13 (1976).

STATEMENT OF THE CASE

Parkson Corporation (Parkson) is a manufacturer of wastewater equipment with its headquarters and principal offices in Fort Lauderdale, Florida. It offers specialized products for wastewater treatment projects primarily through the use of regional sales representatives throughout the country. ACS Construction Company, Inc., of Mississippi (ACS) is a construction contractor specializing in large federal projects. In June, 1989, ACS won a bid from the U.S. Army Corps of Engineers (Corps) to construct a wastewater treatment facility at Fort Bragg, North Carolina. Prior to the bid being awarded, Parkson, through its sales representative, had sent out an offering "to all bidding contractors" to supply three of its Parkson Aqualift™ screw pumps. ACS was among the recipients of this offering. Parkson believed that its Aqualift™ screw pumps met the intent of the specifications and all applicable performance requirements for the screw pump component of the project. Its three main competitors for this project were CPC Engineering Corporation (CPC), around whose particular pumps the specifications were written (although it was not named as a sole source specification), Lakeside Equipment Corporation (Lakeside) and Parkson. Since Parkson was the low bidder for the screw pumps, ACS contracted with Parkson to supply its pumps.

The following facts, *which are uncontradicted by anything of record in the lower court*, were established through the testimony of G. Parks Souther, Parkson's President since 1979, and John Hallahan, Parkson's Assistant Director of Operations, a twenty-seven year Parkson employee.

While the literal terms of the specification described in every detail a specific proprietary pump manufactured by one of Parkson's competitors, CPC, it was not written as a "sole source spec" as that term is understood in the industry. That is, it is not uncommon for specifications for government projects to be written by describing in detail a certain manufacturer's equipment. However, it is customary in the industry, and also required by Federal regulations, that such specifications may be satisfied by competing brands of equipment which meet the *intent* and *performance requirements* of the specifications. (*See* Federal Regulations at 40 C.F.R. § 35.936-13 (1976)). Therefore, unless it is specifically designated as a "sole source" specification, naming the specific brand of equipment to the exclusion of all others, it is presumed in the industry that competing brands which fulfill the intent and performance criteria of the specifications may be substituted. That is what all parties to this transaction assumed and specifically what Parkson assumed in submitting its quotation and accepting the purchase order.

Parkson relied upon compliance by the Corps with the applicable Federal regulations prohibiting unduly restrictive, proprietary specifications and further assumed that its submittal of a pump equivalent to the CPC brand pump would be given a reasonable and fair determination, as is also customary in the industry. It is undisputed that, as the specification was construed by the Corps, there is literally *no other pump*, apart from CPC's pump, which would meet every single mechanical detail of that specification. This is analogous to a government specification describing in detail a Ford truck, and a contractor submitting as part of a bid package a Chevrolet truck which has comparable equipment and performance characteristics. It may not have the identical grill and the engine may have a slightly different configuration and mechanical details, yet they both perform the same function and are considered equivalent. Here too, Parkson,

as well as ACS, believed that Parkson's pumps were equivalent to the CPC pump which was specified.

Notwithstanding approval by the Corps' own consulting engineer, the Corps arbitrarily rejected Parkson's pump for the job citing as its *only* basis for rejection that the pumps "did not meet the requirement of 10.5.4 that 'a grease lubricated upper bearing consisting of a split housing fitted with dual bearings (one for thrust and one for radial load) will not be allowed due to the limited self-alignment capability of this design.' " **It is undisputed that this mechanical specification, as construed by the Corps, eliminates *every* pump in the market-place except the CPC pump.**

Despite Parkson's best efforts to do everything it reasonably could to satisfy the Corps, which was acting in contradiction to the recommendations of its own consulting engineer, Parkson and ACS were unable to persuade it to approve Parkson's equipment. Therefore, without the Corps' approval Parkson could not deliver its pumps.

ACS brought suit seeking damages from Parkson for the difference between the contract price for Parkson's screw pump equipment and the price it ultimately paid for substitute equipment from CPC. Parkson filed its Answer and Amended Affirmative Defenses setting up various affirmative defenses, the most significant of which were the doctrines of commercial impracticality/frustration of purpose and the violation of federal law prohibiting the use of proprietary, exclusionary or discriminatory requirements in formulating specifications for federal projects. Federal jurisdiction was based upon diversity of citizenship under 28 U.S.C. § 1332(a)(1).

The case proceeded to a two day nonjury trial resulting in the Memorandum Opinion (7a) and Amended Final Judgment

against Parkson in the sum of $164,801 (5a) being appealed herein. After repeatedly stating during the course of proceedings that the court was "agonizing" in this case between two relatively innocent parties (it being the Corps which had irrationally refused Parkson's equipment), the trial court ultimately sided with ACS. In so doing, the trial court acknowledged the "persuasive value" of the "factually similar" case of *Waldinger Corp. v. CRS Group Engineers, Inc.*, 775 F.2d 781 (7th Cir. 1985) but specifically declined to follow it. The appeal to the Eleventh Circuit ensued. Without commenting on the conflict with *Waldinger*, or any discussion of the underlying public policy issues, the Eleventh Circuit issued its opinion affirming the lower court judgment. (3a-4a).

As a result of the rejection by the Corps of Parkson's pumps, Parkson never received any money on this project, notwithstanding having expended substantial man hours on submitting approval drawings, corresponding and working to obtain approval of its pumps for this project. On the other hand, ACS has acknowledged that it made a profit on this job.

That the Corps violated federal regulations in creating a hidden sole source specification *was acknowledged by all parties, the lower court and the Corps itself:*

1. ACS stated at page 6 of its Answer Brief "by letter of August 22, 1990, ACS advised the Corps that the upper bearing assembly was a proprietary specification *which could only be met and furnished by CPC . . .*" (emphasis added).

2. The trial court judge, at the conclusion of the testimony in this case, observed that "both of the parties to this lawsuit appear to have acted in good faith, have not acted irresponsibly, have effectively been taken in, if you

will, by a specification that is a *disguised sole source specification.*" (emphasis added).

3. The Corps itself admitted the pump specification was improperly drawn as a proprietary procurement as evidenced by the memorandum from the chief of its own design branch:

> **"When the AE (architectural engineer) wrote the specification for screw pumps on subject facilities he failed to comply with the requirements of the Design Manual for AE's which prohibits the specifying of proprietary items."** Defendant's Exhibit 3 in the trial court-Memorandum of William O. Plunkett, Jr., P.E., Chief, Design Branch, Engineering Division.

4. Parkson's own witnesses and Michael Hermesmeyer, P.E., the only independent waste water industry expert called to testify at trial, attested to the fact that, as the specification was construed by the Corps, there is literally *no other pump*, apart from the CPC brand, which could meet every single mechanical detail of that specification.

It is beyond dispute that Parkson's pump met all performance criteria for the project.

REASONS FOR GRANTING THE WRIT

Petitioner Parkson submits that it is of vital public interest that free market competition and fairness be enforced and upheld in federal procurement contracts. This is required by the Federal Regulations and public policy discussed herein. These principles were applied and upheld on virtually indistinguishable facts by the Seventh Circuit Court of Appeals in the case of *Waldinger Corporation v. CRS Group Engineers, Inc.*, 775 So. 2d 781 (7th Cir. 1985). The trial court in this case expressly refused to follow *Waldinger* which held that an equipment vendor had a right to rely upon the federal regulations prohibiting exclusionary specifications. By refusing to follow *Waldinger*, the trial court and the Eleventh Circuit are effectively authorizing the federal government to ignore these Federal Regulations, thus permitting *in that circuit* the practice of secretly drafting specifications which can only be met by one brand of equipment. The detriment to the taxpayers resulting from this limitation of competition is as ominous as it is obvious. It is this precise conduct which the Federal Regulations discussed herein were designed to preclude! An analysis and comparison of the *Waldinger* facts and opinion are necessary to fully understand this point. The court there held that where the consulting engineer insisted on literal compliance with exclusionary specifications, *that fact* constituted an unforeseeable circumstance which rendered performance commercially impracticable under U.C.C. § 2-615. There, a belt filter press company named Ashbrook bid to supply its belt filter presses for the project, even though the specifications literally described a machine manufactured by the Carter Company (Carter).

In reaching its decision, the Seventh Circuit cited factual circumstances establishing commercial impracticability which strongly parallel this case, and are summarized below:

(a) The court found that the consulting engineer for the project drew the specifications using the Carter equipment as its model. In the words of the court:

> Carter supplied the data and performance descriptions which were incorporated in the specifications drawn by Dietz (the consulting engineer). Dietz took the Carter performance claims at face value, making no independent study of them. Dietz knew **that no manufacturer but Carter** recycled the belt wash water used in the machine but nevertheless specified that subsystem.

Id. 784 (emphasis added).

Similarly, in the instant case the Corps admitted that it "copied technical data from a manufacturer's specification in place of the guide specifications" used by the Corps, using CPC's precise mechanical description in every detail.

In *Waldinger*, Ashbrook nonetheless believed its equipment to be suitable as an "or equal" on the project and bid its equipment with that in mind. Again, quoting the *Waldinger* court:

> Ashbrook, believing it could meet the performance requirements of the specifications and **relying on its experience that specific mechanical subsystems were ordinarily waived by an owner's engineer if a supplier could show that its equipment met performance specifications**, bid to supply the sludge dewatering equipment in March, 1978. A March 10, 1978 evaluation prepared by a member of the Dietz design

> team concluded that Ashbrook's equipment did indeed meet the performance specifications.

Id. 784 (emphasis added).

Here, too, Parkson established that it was "relying on its experience" that specific mechanical subsystems and configurations are routinely waived by the consulting engineer if its equipment meets performance requirements. No witness has disputed that Parkson's Aqualift™ pumps met all performance requirements of the project. In fact, the Corps' own consulting engineer, CAN Engineering, actually recommended approval of Parkson's pumps, which recommendation was ultimately overridden by the Corps.

(b) The *Waldinger* court found "that no manufacturer but Carter could have literally complied with the specifications for the (equipment)". *Id.* 785. Here, as well, the evidence of record established that no pump manufacturer but CPC could have met the *literal mechanical* specifications for the screw pumps.

(c) The court in *Waldinger* found that the consulting engineer's decision to, in effect, require only the Carter equipment "was conscious and in deliberate disregard of the EPA regulations requiring free and open competition." *Id.* 786. Those are the same regulations which Parkson established it was relying upon in this case. These prescribe in pertinent part the following requirements:

> 1. Under the heading "Non-Restrictive Specifications", the regulations set forth that, subject to several exceptions not applicable here, "no specification for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or

discriminatory requirements other than those based upon performance . . ."

2. Under the heading "Sole Source Restriction", it provides that, subject to several exceptions not here applicable, "a specification shall not require the use of structures, materials, equipment, or processes which are known to be available **only from a sole source** . . ." (emphasis added). (40 C.F.R. § 35.936-13 (1976), reproduced at 17a.

The Seventh Circuit, in upholding the District Court's opinion stated that:

> The district court found that a basic assumption of the contract between Waldinger and Ashbrook was that Ashbrook equipment was competitive and would comply with the specifications drafted by Dietz. That assumption was based upon the belief that Dietz would interpret its specifications in a competitive and nonrestrictive manner. Because Dietz did not do so, performance by Ashbrook was rendered impracticable.

Id. 787.

(d) Using language similar to the purchase order involved in this case, in *Waldinger* the purchase order provided that Ashbrook agreed to furnish equipment "in strict accordance with plans, specifications and general conditions applicable to the contract of the purchaser with the owner". *Id.* 787. Nevertheless, the court held that the EPA regulations (quoted above) were incorporated into all sub-agreements on federal projects and that

a consulting engineer is required "to draft and interpret its specifications in a nonproprietary, nonrestrictive manner." *Id.* 787. Since these regulations are read into every contract, the court upheld the defense of impracticability stating the following rationale:

> Although the section 2-615 defense would be unavailable to Ashbrook if this contractual provision (requiring strict compliance with the specifications) stood alone, we are presented with EPA regulations that Ashbrook contends narrow the scope of its otherwise broad contractual obligation to Waldinger. We believe, in light of the express contractual terms prohibiting exclusionary specifications, that Ashbrook obligated itself to provide equipment that would satisfy the specifications when interpreted in a competitive, nonrestrictive manner. Ashbrook assumed the risk that it could not supply a machine that satisfied specifications so interpreted, **but did not assume the risk that it could not manufacture a Carter machine**. To hold otherwise is to read out of the contract the EPA regulations in which the federal public policy of free and open competition is incorporated. 40 C.F.R. § 35.936-3 (1976). We decline to do so.

Id. 788 (emphasis added).

Here, too, Parkson was entitled to have the specifications read in a nonproprietary, nonrestrictive manner, which was not done in this instance. Parkson "did not assume the risk that it could not manufacture" the CPC machine.

While the trial court recognized in its memorandum opinion (7a) that *Waldinger* was "factually similar" and "while recognizing the persuasive value of *Waldinger*", it tersely stated that it "declines to follow it and notes that authority from one circuit is not binding upon another." While that may be literally true, it is Parkson's position that the *Waldinger* case *should* have been followed since it is sound in its analysis and based upon the rational fulfillment of stated federal policy. Parkson had no way of knowing that this was a secret sole source specification capable of being satisfied, as construed by the Corps, *only* by CPC. This runs absolutely counter to the open competition doctrine which is the foundation of federal procurement policy. This decision has profound implications for the federal procurement industry and the American taxpayer.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 3, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-4375

ACS CONSTRUCTION COMPANY INCORPORATED OF MISSISSIPPI,

Plaintiff-Appellee,

versus

INTERSTATE UTILITY SALES INCORPORATED,

Defendant,

PARKSON CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: KRAVITCH and COX, Circuit Judges and JOHNSON, Senior Circuit Judge

Appendix A

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 5, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4375
Non-Argument Calendar

D. C. Docket No. 92-6538-CIV-DTKH

ACS CONSTRUCTION COMPANY INCORPORATED OF MISSISSIPPI,

Plaintiff-Appellee,

versus

INTERSTATE UTILITY SALES INCORPORATED,

Defendant,

PARKSON CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(April 5, 1996)

Before KRAVITCH and COX, Circuit Judges, and JOHNSON, Senior Circuit Judge.

Appendix B

PER CURIAM:

This case originated when Appellee ACS Construction Company, Inc. ("ACS") filed a complaint in the United States District Court for the Western District of North Carolina seeking damages for breach of contract from Appellant Parkson Corporation ("Parkson") and Parkson's sales representative Interstate Utility Sales, Inc. ("Interstate"). Venue was subsequently transferred to the United States District Court for the Southern District of Florida. After a two day non-jury trial, a final judgment was entered against Parkson in the sum of $164,801.00. Interstate was found not liable.

Parkson now appeals the judgment, contending that the district court erred when it refused to adopt and apply the doctrines of frustration of purpose and commercial impracticability to the facts of this case. We review the district court's findings of fact for clear error. *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1023 (11th Cir. 1989). We review the district court's application of the law to those facts *de novo*. *Cabriolet Porsche Audi v. American Honda Motor Co.*, 773 F.2d 1193, 1201 (11th Cir. 1985).

After a careful review of the record, we conclude that this appeal is without merit.

AFFIRMED.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED FEBRUARY 22, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-53-CIV-HURLEY

ACS CONSTRUCTION CO., INC.,

Plaintiff,

vs.

INTERSTATE UTILITY SALES, et al.,

Defendants.

AMENDED FINAL JUDGMENT

THIS CAUSE comes before the court upon defendants' motion for new trial and/or to alter or amend judgment [DE 49]. Having reviewed the arguments of counsel, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Plaintiff, ACS Construction Co., shall recover from the defendant Parkson Corporation, the sum of $164,801.00. Defendant, Interstate Utility Sales, is not liable for damages, as it was acting as the agent for the disclosed principal, Parkson. *See Philip Schwartz Inc. v. Gold Coast Graphics, Inc.*, 623 So. 2d 819 (Fla. 4th DCA 1993); *Panama Realty, Inc. v. W.F. Robison*, 305 So. 2d 34 (Fla. 1st DCA 1974).

Appendix C

2. The prior final judgment [DE 48] is **VACATED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 22 day of *Feb.*, 1995.

s/ Daniel T.K. Hurley
Daniel T.K. Hurley
United States District Judge

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED JANUARY 17, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-6538-CIV-HURLEY

ACS CONSTRUCTION CO., INC.,

Plaintiff,

vs.

INTERSTATE UTILITY SALES, and PARKSON CORPORATION,

Defendants.

MEMORANDUM OPINION

THIS CAUSE, an action for breach of contract, was tried before the court in a bench trial. Andrew Kilpatrick Esq. and Alan C. Brandt, Esq., represented the plaintiff; John B. Dichiara, Esq. represented the defendants. Based upon the testimony and documentary exhibits received in evidence, and pursuant to rule 52, Fed.R.Civ.P., the court makes the following

FINDINGS OF FACT

1. On May 22, 1989, the Department of the Army, Savannah District, Corps of Engineers ("Corps") issued an invitation for

bids to upgrade the sewage and water treatment plant at Fort Bragg, North Carolina. The project called for the installation of three screw pumps, devices which move large volumes of water from one level to another. The Corps' specifications required, among other things, that the screw pumps have a self-aligning single upper bearing assembly lubricated by oil. To underscore the importance of these requirements, another specification stated, "A grease lubricated upper bearing consisting of a split housing fitted with dual bearings . . . will not be allowed . . . ."

2. Parkson Corporation ("Parkson"), located in Fort Lauderdale, Florida, manufactures screw pumps and other waste water equipment. Parkson markets its products through regional sales representatives, one of whom was Interstate Utility Sales, Inc. ("Interstate").

3. Interstate learned of the Fort Bragg project's need for screw pumps and transmitted the Corps specifications to Parkson. Thereafter, Interstate issued a letter on Parkson's behalf to all bidding contractors and indicated that Parkson's pricing information was "per Section 11P1" of the Corps specifications.

4. ACS Construction Company, Inc. of Mississippi, ("ACS") is a Mississippi corporation engaged in the construction business in the southeastern United States. Much of its work is done on government projects. In May and June of 1989, ACS was gathering information preparatory to submitting a bid on the Fort Bragg project.

5. John H. Powers, the vice president of ACS, received three screw pump proposals: Parkson's for $161,000, Lakeside Equipment Corporation's for $327,000, and CPC Engineering

Corporation's for $325,801.00. Noting the substantial price differential between Parkson and its two competitors, Powers contacted Steve Carter of Interstate and asked him to confirm that Parkson's screw pumps complied with the Corps' specifications. Carter contacted Parkson and reported back to Powers that Parkson's screw pumps complied with the Corps specifications.

6. John F. Hallahan, Parkson's engineering manager for its screw pump division, the AquaLift™ line, became involved in the Parkson-ACS deal in October of 1989, three months after Parkson submitted its bid to ACS. At trial he testified that from the very beginning he realized that Parkson's pumps did not meet the Corps' literal specifications because they were matched to screw pumps manufactured by CPC Engineering Corp. From this testimony the court concludes that Parkson knew, or should have known, when it began its discussions with ACS that its screw pumps did not meet the Corps' published specifications.

7. If Parkson believed that the Corps' specification called for a proprietary design or were illegally disguised sole-source specification it could have sought a waiver from the Corps or, failing that, could have filed a bid protest. Parkson did neither.

8. Relying on Parkson's bid and affirmative representation that its screw pumps met the Corps' specifications, ACS included Parkson's pricing information in its bid to construct the upgrade of the Fort Bragg water and sewage treatment plant.

9. ACS was the low bidder on the Fort Bragg project by $5,000 and was awarded the contract.

10. ACS contracted with Parkson to purchase three AquaLift™ screw pumps for $161,000.00

Appendix D

11. Parkson's screw pumps did not comply with the Corps' published specifications. The Parkson upper bearing assembly had grease lubricated dual bearings rather than the specified oil-lubricated self-aligning single upper bearing assembly. The Corps refused to waive this deviation from the specifications and, consequently, ACS was required to purchase three screw pumps from CPC Engineering Corporation for $325,801.00

12. ACS sought an equitable adjustment with the Corps alleging, as Parkson has in this case, that the Corps' specifications for the screw pumps' upper bearing assembly were proprietary, *i.e.*, that the specifications if construed literally could be fulfilled by only one manufacturer. The contracting officer rejected this contention out-of-hand, noting that "[p]ost-award is not the time to make such a contention." During the bidding period would have been the appropriate time to do so. The contracting officer further noted "[t]he specifications unambiguously required a self-aligning single upper bearing assembly on the pumps." Because Parkson's pump did not meet the published criteria, the contracting officer denied ACS' claim in its entirety.

13. ACS next filed a complaint in the United States Claims Court, now known as the United States Court of Federal Claims. Again ACS contended that the specifications were proprietary and, therefore, ACS was entitled to an adjustment in the contract price. Judge Hodges granted summary judgment in favor of the Government, finding that "[o]bjections to proprietary specifications ordinarily must be raised prior to execution of the contract." The court also found that the rejection of Parkson's screw pumps was justified because they did not comply with the published specifications.

Appendix D

From the foregoing findings, the court reaches the following

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter.

2. ACS and Parkson's contract required Parkson to deliver three AquaLift™ screw pumps which met the Corps' specifications. In turn, ACS was obligated to pay Parkson $161,000.00

3. Parkson breached the contract because the AquaLift™ screw pumps did not comply with the Corps' published specifications.

4. A buyer is entitled to recover the difference between the contract price and the cost of obtaining substitute goods when a seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance. Sections 672.711, 672.712, Fla. Stat. (1993).

5. ACS is entitled to recover $164,801.00, the difference between the cost of the pumps purchased from CPC Engineering Corporation ($325,801.00) and the contract price ($ 161,000.00).

6. In reaching this conclusion, the court has considered and rejected Parkson's defense of commercial impracticability. Parkson has argued that it was commercially impracticable for it to comply with the specifications because the pump sought by the Corps was proprietary and in violation of the EPA regulation

on non-restrictive specifications. These regulations provide in pertinent part:

> No specifications for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance.
>
> . . .
>
> A specification shall not require the use of structures, materials, equipment, or processes which are known to be available only from a sole source. . .

41 C.F.R. § 35.936-13 (1992). Parkson argues that the pump specified in § 11P1 of the Corps contract could only be obtained from CPC Engineering Corporation, and was thus proprietary. This may be true, but it does not constitute a legal defense against ACS' claim. Parkson had superior knowledge that its pump did not comply with the published specifications. Moreover, Parkson could have, but elected not to, obtain a pre-bid waiver, or otherwise contest the specifications. Finally, Parkson made affirmative misrepresentations to ACS and assumed the risk that the Corps, a sophisticated owner, would not be persuaded to grant a post-bid waiver.

"The time for objecting to a proprietary specification is ***before*** the submission of bids, and not after award." *Appeal of Wilner Construction Company*, ASBCA No. 25719, 1983 WL 13341 (quoting *T.H. Taylor, Inc.*, ASBCA No. 26494, 82-2 BCA

¶ 15,877 at 78,753) (emphasis added); *see also American Elec. Corp. v. United States*, 579 F.2d 602 (Ct. Cl. 1978). Defendants failed to address the allegedly proprietary nature of the pump specifications prior to the bidding process. Instead, defendants assured ACS that the Parkson pumps were "per § 11P1 specification," when it knew, or should have known, that the pump did not strictly comply with the specifications

7. In order for performance under a contract to be commercially impracticable, there must be an occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made. *See* Section 672.615. Fla. Stat. (1993). Therefore, if the contingency which came to fruition could have been foreseen, the defense is not available. The Corps' refusal to waive the specifications — whether proper or not — could have been foreseen by the defendants. The law is well settled that "[t]he Government is entitled to receive that for which it contracts." *Manning Electric & Repair Co, Inc. v. United States*, 22 Cl. Ct. 240, 244 (Cl. Ct. 1991) (*citing Data Gen. Corp. v. United States*, 915 F.2d 1544 (Fed. Cir. 1990); *American Elec. Corp.*, 579 F.2d at 602, *Farewell Co. v. United States*, 148 F. Supp. 947 (Ct. Cl. 1957). When the government contract requires a particular product, "it is not within [the contractor's] province to decide what materials are equally satisfactory and substitute his judgment for that of the government." *Elastomeric Roofing Assoc. Inc. v. United States*, 26 Cl. Ct. 1106, 1114 (Cl .Ct. 1992) (contractor had no right to substitute a plural-component product when the contract specifically called for a single-component urethane rubber elastomeric membrane) (quoting *H.L.C. & Assoc. Constr. Co. v. United States*, 367 F.2d 586, 598 (Ct. Cl. 1966); *see also Farwell Co.*, 148 F. Supp. at 947 (contractor could not unilaterally substitute "tubing" when "pipe" was specified). The defendants

have thus failed to establish the elements of commercial impracticability.

8. In support of its defense of commercial impracticability, Parkson relies upon the factually similar case of *Waldinger Corp. v. CRS Group Engineers, Inc.*, 775 F.2d 781 (7th Cir. 1985). The Seventh Circuit held that the doctrine of commercial impracticability was available to a supplier who was unable to meet both mechanical and performance specifications. In that case the engineer required literal compliance with specifications which had no scientific or rational basis. *Id.* at 788. While recognizing the persuasive value of *Waldinger*, the court declines to follow it and notes that authority from one circuit is not binding upon another. *See Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985). Moreover, the key factual difference between the case at bar and *Waldinger* is the communication that existed between the engineer and supplier was notably absent from the case at bar. During the pre-bid stage in *Waldinger*, the supplier communicated to the engineer reservations concerning its ability to comply with the performance specifications when literal mechanical compliance was achieved. That supplier was therefore in a better position to assume that the mechanical specifications would be waived. Here, Parkson did not inform ACS or the Corps regarding its deviation from the specifications.

9. As the experienced supplier of screw pumps, Parkson had superior knowledge regarding the Corps specifications. Instead of contesting the specifications prior to making the contract with ACS, Parkson assumed the risk that the Corps would not deviate from its specifications. As stated in the *Appeal of Wilner Construction Company*,

"When the subcontractor/supplier involved

> in this dispute submitted equipment for approval without knowing whether it met the characteristics called for by the specification, ***it assumed the risk that it would be rejected***. As an experienced supplier of electrical equipment under government contracts, the subcontractor must have known that the Government has the right to insist upon compliance with the specification."

ASBCA No. 25719, 1983 WL 13341 (emphasis added). It is no defense that the defendant assumed the Corps would waive the technical specifications, as this contingency could have been foreseen.

10. Unlike ACS, Parkson could have challenged the alleged proprietary nature of the specifications prior to bidding. Its failure to do so must be borne by Parkson.

11. The court concludes that the plaintiff is entitled to a monetary award against the defendant in the sum of $164,801.00.

12. Jurisdiction is reserved for the purpose of determining and entering awards of costs and attorney's fees.

13. In accord with this memorandum opinion, the Clerk of the Court, pursuant to Rule 58, Fed.R.Civ.P., shall herewith enter judgment in favor of the plaintiff and against the defendant for the sum of $164,801.00.

Appendix D

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this *14th*, day of *Jan.*, 1995.

s/ Daniel T.K. Hurley
Daniel T.K. Hurley
United States District Judge

APPENDIX E — RELEVANT REGULATION

40 CFR § 35.936-13

§ 35.936-13 Specifications.

(a) *Nonrestrictive specifications.* (1) No specification for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words "or equal." If brand or trade names are specified, the grantee must be prepared to identify to the Regional Administrator or in any protest action the salient requirements (relating to the minimum needs of the project) which must be met by any offeror. The single base bid method of solicitation for equipment and parts for determination of a low, responsive bidder may not be utilized. With regard to materials, if a single material is specified, the grantee must be prepared to substantiate the basis for the selection of the material.

(2) Project specifications shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods, and processes, except to the extent that innovative technologies may be used under § 35.908 of this sub-part.

(b) *Sole source restriction.* A specification shall not require the use of structures, materials, equipment, or processes which are known to be available only from a sole source, unless

the Regional Administrator determines that the grantee's engineer has adequately justified in writing that the proposed use meets the particular project's minimum needs or the Regional Administrator determines that use of a single source is necessary to promote innovation (see § 35.908). Sole source procurement must be negotiated under § 33.500 et seq., including full cost review.

(c) *Experience clause restriction.* The general use of experience clauses requiring equipment manufacturers to have a record of satisfactory operation for a specified period of time or of bonds or deposits to guarantee replacement in the event of failure is restricted to special cases where the grantee's engineer adequately justifies any such requirement in writing. Where such justification has been made, submission of a bond or deposit shall be permitted instead of a specified experience period. The period of time for which the bond or deposit is required should not exceed the experience period specified. No experience restriction will be permitted which unnecessarily reduces competition or innovation.

(d) *Buy American* — (1) *Definitions.* As used in this subpart, the following definitions apply:

(i) *Construction material* means any article, material, or supply brought to the construction site for incorporation in the building or work.

(ii) *Component* means any article, material, or supply directly incorporated in construction material.

(iii) *Domestic construction material* means an unmanufactured construction material which has been mined or

produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

(iv) *Nondomestic construction material* means a construction material other than a domestic construction material.

(2) *Domestic preference.* Domestic construction material may be used in preference to nondomestic materials if it is priced no more than 6 percent higher than the bid or offered price of the nondomestic materials including all costs of delivery to the construction site, any applicable duty, whether or not assessed. Computations will normally be based on costs on the date of opening of bids or proposals.

(3) *Waiver.* The Regional Administrator may waive the Buy American provision based upon those factors that he considers relevant, including:

(i) Such use is not in the public interest:

(ii) The cost is unreasonable;

(iii) The Agency's available resources are not sufficient to implement the provision, subject to the Deputy Administrator's concurrence;

(iv) The articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured in

the United States in sufficient and reasonably available commercial quantities or satisfactory quality for the particular project; or

(v) Application of this provision is contrary to multilateral government procurement agreements, subject to the Deputy Administrator's concurrence.

(4) *Contract provision.* Notwithstanding any other provision of this subpart, bidding documents and construction contracts for any step 3 project for which the Regional Administrator receives an application after February 1, 1978, shall contain the "Buy American" provision which requires use of domestic construction materials in preference to nondomestic construction materials.

(5) *Substitution.* If a nondomestic construction material or component is proposed for use, a bidder or contractor may substitute an approved domestic material or component (at no change in price), if necessary to comply with this subsection.

(6) *Procedures.* The Regional Administrator may use the appropriate procedures of § 35.939 in making the determinations with respect to this subsection. He shall generally observe the Buy American procedures, regulations, precedents, and requirements of other Federal departments and agencies.